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IN THE
COURT OF APPEALS OF INDIANA

DAVID KEOUGH,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 43A05-0602-PC-63
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE KOSCIUSKO COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0210-FC-147

September 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Keough appeals the denial of his petition for post-conviction relief. We affirm.

Issues

Keough raises five issues, which we consolidate and restate as:

I. whether issues regarding the exclusion of evidence, prosecutorial misconduct, and instruction of the jury were properly raised in his petition for post-conviction relief; and

II. whether he received ineffective assistance of trial counsel and appellate counsel.

Facts

In September 2003, Keough was convicted of Class C felony battery after he punched his girlfriend, L.B., in the face. Keough subsequently filed a direct appeal challenging the exclusion of certain evidence. In a memorandum decision, we affirmed his conviction. See Keough v. State, No. 43A03-0311-CR-452 (Ind. Ct. App. Aug. 184, 2004). On May 18, 2005, Keough filed a pro se petition for post-conviction relief. At the hearing on his petition, Keough referred to several exhibits, but did not offer them into evidence. On December 14, 2005, the post-conviction court denied Keough's petition. He now appeals.

Analysis

A petitioner for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When a petition for post-conviction relief is denied, the petitioner appeals a negative judgment because he or

she had the burden of establishing the grounds for relief before the post-conviction court and did not meet that burden. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000). When appealing a negative judgment, the petitioner must demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Id.

Although Keough proceeded pro se during the post-conviction proceedings and proceeds pro se on appeal, a litigant who proceeds pro se is held to the same established rules of procedure that trained legal counsel is required to follow. Hill v. State, 773 N.E.2d 336, 346 (Ind. Ct. App. 2002), clarified on reh'g, trans. denied (2003), cert. denied, 540 U.S. 832, 124 S. Ct. 79 (2003). One of the risks that a defendant takes when deciding to proceed pro se is that he or she will not know how to accomplish all of the things that an attorney would know how to accomplish. Id. (citing Carter v. State, 512 N.E.2d 158, 162 (Ind. 1987) ("A defendant who proceeds pro se, however, must accept the burdens and hazards of self-representation.")).

I. Availability of Claims

Keough argues that the post-conviction court improperly denied his allegations that the trial court improperly excluded certain evidence,[1] that the prosecutor engaged in

[1] Keough argues, "the trial court omitted a confession given by another individual stating that they perpetrated the acts with which the defendant was charged." Appellant's Br. p. 7. This argument is waived, however, because it is not supported with citations to the appendix or parts of the record upon which Keough relies as required by Indiana Appellate Rule 46(8)(a). See Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), trans. denied (2005).

misconduct, and that the jury was improperly instructed. Keough's first argument regarding the exclusion of certain evidence was raised on direct appeal. We rejected this claim and affirmed his conviction. "Claims that have already been decided adversely are barred from re-litigation in successive post-conviction proceedings by the doctrine of res judicata." Matheney v. State, 834 N.E.2d 658, 662 (Ind. 2005). Because this claim was litigated on direct appeal, its relitigation is barred by the doctrine of res judicata.

Keough also argues that the prosecutor committed prosecutorial misconduct during trial and that the trial court improperly instructed the jury. These claims, however, were available at the time of Keough's direct appeal but were not raised. It is well-settled that, "because a post-conviction relief proceeding is not a substitute for direct appeal but rather a process for raising issues unknown or not available at trial, an issue known and available but not raised on direct appeal may not be raised in post-conviction proceedings." Collins v. State, 817 N.E.2d 230, 232 (Ind. 2004). Keough's failure to present these claims on direct appeal results in their procedural default. See Bunch v. State, 778 N.E.2d 1285, 1289 (Ind. 2002) (concluding that defendant's failure to present an available claim on direct appeal forecloses him from raising it in the post-conviction proceeding).

II. Ineffective Assistance of Counsel Claims

Keough argues that the trial court improperly denied his claim of ineffective assistance of trial counsel because trial counsel failed to seek an interlocutory appeal of the trial court's granting of the State's motion in limine. He also argues that he received ineffective assistance of appellate counsel because appellate counsel failed to consult

with him regarding his appeal, which resulted in the jury instruction issue not being raised on direct appeal.

To establish ineffective assistance of counsel:

> First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show prejudice: a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different.

McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002) (citations omitted). "We afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions." Id. The failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. Taylor v. State, 840 N.E.2d 324, 331 (Ind. 2006).

With regard to these claims, however, Keough failed to offer his numerous exhibits into evidence. As such these exhibits were not admitted into evidence and are not included in the Exhibits prepared by the trial court clerk. Further, Keough's statements during the hearing do not appear to be anything more than argument in support of his petition. In the absence of evidence of the alleged ineffective assistance of trial counsel and appellate counsel, we cannot conclude that Keough has established that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. See Bivins, 735 N.E.2d at 1121.

Nevertheless, even if we were to assume that the information included in Keough's appendix was properly admitted into evidence, Keough has not established that trial counsel was ineffective for not seeking an interlocutory appeal of granting of the State's motion in limine because he has not shown prejudice. Keough appears to argue that the motion in limine improperly excluded the same evidence that he argued on direct appeal should have been admitted.[2] As we observed in our 2004 memorandum decision:

> Contrary to Keough's assertion, his conviction did not rest solely upon L.B.'s testimony. As set forth above, the conviction was also substantially supported by the testimony of Black, Sharon, Officer Zartman, and Enyeart. In light of this evidence, as well as the jury's knowledge that Enyeart had made threats of physical violence against L.B. about a week before the incident, we conclude that any error in the exclusion of additional details regarding the threats did not affect Keough's substantial rights and was, thus, harmless.

Keough, No. 43A03-0311-CR-452, slip op. at 7-8.

In light of the overwhelming evidence against him and the fact that the general nature of the evidence to which Keough refers was known to the jury, Keough has not established that the outcome of the trial would have been different had an interlocutory appeal been successful and had he been permitted to offer what appears to be cumulative evidence at trial. Appellant's Br. at 9.

Keough also argues that defense counsel failed to properly investigate and subpoena witnesses. These claims, however, are nothing more than unsupported attacks on counsel's discretion to choose strategy and tactics. See McCary, 761 N.E.2d at 392.

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[2] Again, Keough fails to provide us with citations to the appendix indicating what evidence was excluded or what was covered in the motion in limine.

Given the great deference afforded to trial counsel's discretion and the strong presumption that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions, these bare allegations are insufficient to establish that the trial court erred in denying him post-conviction relief.

Keough further contends that he received ineffective assistance of appellate counsel who denied his requests "to see any material that was to be submitted to the Indiana Court of Appeals." Appellant's Br. p. 13. Keough contends that as a result he was denied the opportunity to participate in the appeal and ensure that the appropriate legal arguments were made, including his claim regarding the jury instruction.

The two-pronged standard for evaluating claims of ineffective assistance of trial counsel applies to claims of ineffective assistance of appellate counsel. Taylor, 840 N.E.2d at 839-40. When a petitioner claims the denial of effective assistance of appellate counsel because counsel did not raise issues the petitioner argues should have been raised, we should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable. Id. at 840. Even if counsel's choice of issues was not reasonable, a petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Id.

Keough has not established that that he was prejudiced by appellate counsel's failure to allow him to participate in the preparation of the appeal because Keough's claim based on Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896) is without merit. As we have observed, "An Allen charge is an instruction given to urge an

apparently deadlocked jury to reach a verdict." Parish v. State, 838 N.E.2d 495, 502 (Ind. Ct. App. 2005). "'Such additional instructions are closely scrutinized to ensure that the court did not coerce the jury into reaching a verdict that is not truly unanimous.'" Id. (citation omitted).

Approximately five hours after the jury began its deliberation, the jurors were brought back into the courtroom. The following dialogue took place between the trial court and the jury:

> The Court: I certainly want you to deliberate as long as you feel there is hope that you can achieve a verdict because, as I had indicated to you in the preliminary instruction, that while I do not want anyone to give up his or her heart-felt position, if we do not arrive at a verdict tonight, why the Court will of course try the matter again. So, it is of interest to me, of course, whether or not you believe that with an additional period of time that you will be able to reach an unanimous verdict, I am not intending in any way to coerce you, I would also tell you that if you would like, I would be pleased to re-read to you the final instructions, if they would be any assistance in you deliberations? I do note that each and all of you have a copy of the final instructions with you. Would that be of any assistance to you?
>
> (answer inaudible)
>
> The Court: You do not believe that my re-reading that would help any? I am required by law, I think, to ask you that.
>
> (answer inaudible)
>
> The Court: Alright. Secondly, ladies and gentlemen do you believe that you will be able to reach a verdict in this case, and is there - - would you like for me to ask you to continue to deliberate in this matter?
>
> (answer inaudible)

The Court: I see a yes.

Jury Foreman: We can do that if you want us to.

The Court: Pardon me?

Jury Foreman: If you want us to continue on we will.

The Court: Well, I do not want you do the impossible. If you believe there is still a possibility that you can achieve a verdict then I want you to do that if you can, but I do not want you to have to stay here till 4:00 o'clock in the morning to get there, I mean its not necessary for me to coerce you to do that, but if you would like additional time, I certainly want you to have additional time. With additional time do you think you will be able to reach a verdict in this case?

Jury Foreman: I don't think so, but we can try.

The Court: Alright, let me instruct you then and direct you to go back into deliberations. Let me ask you this, if you, when I send you back in for deliberations, if there's something that you believe that the Court might do to assist you in your deliberations, please communicate that to the bailiff in writing. It may be something that I can't do by virtue of the law, but if it is something, I can do that to assist you with your deliberations, certainly I want to do that, but I am very limited in what I can do. You are, as you recall, both the judges of the law and the judges of the fact in this case, so - -and you have all the facts before you that the evidence has presented. So, that being the case ladies and gentlemen, I think I will send you back in for further deliberations and hopefully you can achieve a verdict, but if you cannot, that's what's called a hung jury, so we can deal with that too. Alright. Is that agreeable with everyone?

(answer inaudible)

App. pp. 254-56. After continuing deliberations, the jury returned a guilty verdict.

There is no evidence that the jury was in fact deadlocked. Although the jury foreman did not think they would be able to reach a verdict if given more time, another juror apparently indicated that the jury would be able to reach a verdict. There is no indication that the jury was in fact unable to reach a verdict and only did so after being urged by the trial court. See Parish, 838 N.E.2d at 502. Moreover, reading the entirety of this exchange, it appears that the trial court was simply attempting to ascertain whether the jury would, if given more time, be able to reach a verdict. This is not an Allen charge. See Nichols v. State, 591 N.E.2d 134, 138 (Ind. 1992) ("When the jury informed the court that they were unable to reach a verdict on Count II, the judge simply told the jury to keep deliberating and that their meal was on the way. This was hardly an 'Allen' charge.").

Moreover, contrary to Keough's argument, the trial court did not provide the jury with any further jury instructions and, therefore, was not required to reread all of the final instructions. The trial court merely offered to reread the final instructions. The trial court did not err.

Given that Keough's Allen claim is without merit, we fail to see how appellate counsel's failure to raise it on direct appeal prejudiced him. Because Keough was not prejudiced, he has failed to establish that he received ineffective assistance of appellate counsel. See Taylor, 840 N.E.2d at 839-40.

Conclusion

The trial court properly denied Keough's petition for post-conviction relief. We affirm.

Affirmed.

ROBB, J., concurs.

SULLIVAN, J., concurs in result.